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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1785

WELLMAN INDUSTRIES, INC.,

Petitioner,

—versus—

THE NATIONAL LABOR RELATIONS BOARD and EDWARD B. MILLER, JOHN H. FANNING, HOWARD JENKINS, JR., RALPH E. KENNEDY, JOHN A. PENELLO, Members of the Board, and REED JOHNSTON, Regional Director for the Eleventh Region,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Petitioner, WELLMAN INDUSTRIES, INC. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 22, 1974.

Opinion Below

The opinion of the Court of Appeals, not yet reported, and the opinion rendered by the District Court for the District of South Carolina appear in Appendix A and Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 22, 1974. A timely petition for rehearing *en banc* was denied February 28, 1974, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether information obtained by the National Labor Relations Board in connection solely with a non-adversary representation proceeding, constitutes investigatory files compiled for law enforcement purposes, within the meaning of 5 U.S.C. 552(b)(7).

2. Whether a determination can be made by a Federal Court that documents are exempt from disclosure under 5 U.S.C. 552(b)(7) without first engaging in an *in camera* inspection of the requested materials.

3. Whether the refusal of the National Labor Relations Board to give Petitioner access to the requested materials combined with a refusal to hold a hearing in the representation proceedings, was a denial to Petitioner of "due process of law".

Statutory Provisions Involved

United States Code, Title 5:

"§552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

. . .

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index pro-

viding identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to the causes the court considers of greater

importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

. . .

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

. . .

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

United States Code, Title 29:

"§159. Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of

the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment . . .

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter . . .

Hearings on questions affecting commerce; rules and regulations

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board— . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof . . .

(3) . . . In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election . . .

Secret ballot; limitation of elections

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer."

Labor Management Relations Act, 1947, as amended by Public Law 86-257, 1959:

"Representatives and Elections

Sec. 9. . . . (d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Prevention of Unfair Labor Practices

Sec. 10. . . . (e) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further

testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . ."

National Labor Relations Board Rules and Regulations, Series 8, as amended:

"Sec. 102.67 . . .

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: Provided, however, That within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D. C. . . .

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error . . .

Sec. 102.69 . . .

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall, consistent with the provisions of section 102.69(d), investi-

gate such objections or challenges, or both. . . . If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to subsection (b) of this section, or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election.

(d) The action of the regional director in issuing a report on objections or challenged ballots, or both, following proceedings under sections 102.62(b) or 102.67, or in issuing a decision on objections or challenged ballots, or both, following proceedings under section 102.67, may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer. If the regional director issues a report on objectives and challenges, the parties shall have the rights set forth in subsections (c) and (f) of this section; if the regional director issues a decision, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith."

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

"* * * nor shall any person * * * be deprived of life, liberty or property, without due process of law."

Statement of the Case

Petitioner, Wellman Industries, Inc. (hereinafter referred to as "Wellman") is a manufacturer of both wool and polyester fiber products with its plant being located in Johnsonville, South Carolina. The Respondents are the National Labor Relations Board, the members of the National Labor Relations Board, and the Regional Director for the Eleventh Regional Office of the National Labor Relations Board (all hereinafter referred to as "the Board").

Wellman's plant has been the subject of an organizational drive conducted by the Textile Workers Union of America (hereinafter referred to as "Union") since August of 1971.

A representation election was held at Wellman's plant in November of 1971. The Union failed to receive enough votes to cause it to be certified and as a result filed certain objections to the election which caused an investigation to be conducted by the staff of the Regional Director for the Eleventh Region.

The Regional Director decided the issue on the basis of an administrative investigation rather than direct a hearing thereon before a hearing officer.

During the course of this investigation statements were taken from persons unknown to Wellman and other materials were gathered by the staff member from the Regional Director's Office. On February 17, 1972, counsel for Wellman, Peter D. Hyman, requested by telegram of the Regional Director and the Executive Secretary of the Board that these documents, including affidavits, statements and other materials, as well as the formal record of the case, be forwarded to him. This request was made pursuant to

the provisions of the *Freedom of Information Act Section of the Administrative Procedure Act,* 5 U.S.C. §552(a)(3). This request was denied. Although the denial letter from the Regional Director indicated that certain parts of the record had been attached, in fact none of the information requested had been attached or otherwise forwarded to Wellman's attorney.

Thereafter oral request for the same information was again made by counsel for Wellman and this request was acknowledged by a letter from the Regional Director, but the information requested was refused by his office.

Thereafter the results of the November 1971 election were set aside and a new representation election was conducted on the 19th and 20th days of April, 1972. As a result of the balloting in this election the union was certified as the bargaining representative for certain employees employed at Wellman's plant.

To date none of the information requested by Wellman has been furnished by the Board.

The action concerned herein was instituted by the filing of a complaint in the United States District Court, District of South Carolina, Florence Division on January 15, 1973. The complaint requested the Court to enjoin all proceedings before the Respondents concerning the Petitioner until certain information was supplied under the *Freedom of Information Act* and in addition sought an Order to enjoin the Respondents from further withholding all documents requested by the Petitioner under the provisions of the *Freedom of Information Act* until same were furnished. Simultaneously with this filing the Petitioner moved the Court for a Temporary Restraining Order restraining the

Respondents from proceeding further on any matters before it involving the Petitioner. This latter request was granted and a Temporary Restraining Order was issued January 15, 1973, by the Honorable Robert W. Hemphill.

Thereafter on January 24, 1973, the Temporary Restraining Order was extended until the matter could be heard on the merits.

The Respondents on January 31, 1973 filed a Motion to Dismiss the Complaint or in the Alternative for Summary Judgment.

Counsel for Petitioner on February 14, 1973, filed a Motion to Dismiss the Respondents' Motions and also filed a Cross Motion for Partial Summary Judgment.

This matter was heard by His Honor Robert F. Chapman on February 20, 1973. The hearing was directed to the matters raised in the Petitioner's request for injunctive relief and matters raised by the Respondents' Motion to Dismiss the Compaint. At the conclusion of the hearing the Temporary Restraining Order previously issued on January 15, 1973, was extended until further Order of the Court.

On February 22, 1973, an Order was issued by His Honor Robert F. Chapman dismissing the Petitioner's Complaint and dissolving the outstanding Temporary Restraining Order (Appendix B), relying on the Court's equitable power not to issue an injunction without specifically deciding whether Exemptions 4 and 7 of the *Freedom of Information Act* (5 U.S.C. §552(b)(4) and (7)) were applicable or not.

An appeal was taken to the United States Court of Appeals for the Fourth Circuit from that portion of the Order

refusing to require the Respondents to make the materials requested under the *Freedom of Information Act* available to the Petitioner.

Said appeal was argued on November 7, 1973 and decided January 22, 1974 affirming same, though not for the reasons given by the District Judge (Appendix A). The Court held that affidavits obtained by the Board in a non-adversary representation proceeding were exempt from the production requirements under Exemption 7 (5 U.S.C. §552(b)(7)). An Order denying Petitioner's petition for rehearing *en banc* was filed February 28, 1974.

REASONS FOR GRANTING THE WRIT

1.

The Court of Appeals has decided an important question of federal law in a case of novel impression which requires decision by the Supreme Court of the United States.

The Fourth Circuit's opinion in this case reflects important statutory and policy decisions growing out of bona fide efforts to invoke and secure Constitutional protection for the Petitioner in a situation where an election is upset by fiat and the information required to test the truth of the basis therefor and to prepare for review thereof is cloaked in secrecy in contravention of a statute designed and intended to provide for freedom of information.

The Court of Appeals has held in essence that if the Board is implementing a procedure pursuant to §7 of the NLRA (which could be any procedure of any nature) it is

"law enforcement" and that the exemption of subdivision (b)(7) is applicable. The Court so held despite the fact that the representation proceeding is non-adversary and interlocutory. There is no enforcement as a result of a representation proceeding determination under the NLRA per se, nor can it be said that such proceeding will lead to anything other than a certification or non-certification of representatives—certainly not an Unfair Labor Practice charge. There is no necessity that there be a representation proceeding in order to give rise to unfair labor practice charge, i.e., when there is a recognition agreement and thereafter there is a refusal to bargain. Certification and enforcement of unfair labor practice orders are therefore wholly separate and distinct.

Implicit in the opinion of the Court of Appeals is a holding that if the Board engages in procedures of any nature which are connected with or flow from any statutory duty or obligation in connection with the implementation of the NLRA, such engagement, per se, is law enforcement within the meaning of the exemption.

We urge that such an interpretation is much too broad and would virtually render any administrative agency immune to do as it wished in secrecy and thereby avoid and render nugatory the purposes and intent of the FOIA, to make information available for purposes of scrutiny and review.

To understand what law enforcement means under the Freedom of Information Act with respect to the National Labor Relations Act, resort must be made to the latter statute in order to determine therefrom what constitutes subject matter of enforcement.

§10(e) of the National Labor Relations Act deals with the enforcement and relates to both the procedure to compel enforcement and the subject matter of enforcement, which is an unfair labor practice. The forum is a Court of Appeals. No mention is made of representation proceedings. As a corollary, final orders of the Board granting or denying in whole or in part relief are reviewable in the Court of Appeals (§10(f)). No mention is made therein of representation proceedings and in any event representation proceedings do not culminate in an order. Therefore §10(e) and §10(f) of the National Labor Relations Act clearly limit and delineate the scope of enforcement of orders to unfair labor practice cases only.

The only time there is a review of a representation proceeding is under §9(d) of the National Labor Relations Act and only if it later results in an unfair labor practice which is the subject of an order by the Board of which enforcement is sought under §10(e). In such case, by indirection and by virtue of the representation proceedings being part of the record of the proceedings, it is reviewed as part of the unfair labor practice case.

Therefore, the Court of Appeals has by its opinion broadened the scope of law enforcement to include therein something which is without the scope of the National Labor Relations Act insofar as enforcement is concerned and we believe is in error in holding "whether or not resulting in an unfair labor practice charge, the Board's purpose was to protect and vindicate rights set out in Section 7."

We suggest that if the matter does not lead to a final order in an unfair labor practice case of which the Board seeks enforcement, then such information is not as a result

of law enforcement under the National Labor Relations Act and, therefore, is not law enforcement within the meaning of Exemption 7 of the *Freedom of Information Act.*

In a time when there is demand and a need by the public, the Congress, the Courts and others for free access to information compiled by governmental agencies, the present decision represents a move in the opposite direction and affords total protection to all materials gathered by the Board merely upon their untested assertion that the information gathered was investigatory in nature. This is not an area where there has been active litigation on the question presently before the Court and, in fact, the only two decisions that relate to the question raised by Wellman were cases dealing with information requested after an unfair labor practice proceeding had been filed and at a time when both parties were represented by counsel in an adversary proceeding. *Barceloneta Shoe Corporation* v. *Compton,* 271 F. Supp. 591 (D.C. Puerto Rico 1967); *Clement Brothers, Inc.* v. *N.L.R.B.,* 282 F. Supp. 540 (N.D. Ga. 1968).

While it is true that the Board has the duty to protect and vindicate all rights contained in Section 7 of the NLRA, it does not follow that other rights of citizens as set forth in other statutes can be ignored in the process. There has been no showing that the disclosure at this point would be so premature as to weaken the Board's presentation of its strongest case before the appropriate administrative board or court.

The court's extension of Exemption 7 under the present circumstances does considerable harm to previous declaration that the overriding emphasis of the legislative history was to make information more available to the public. *Wellford* v. *Hardin,* 444 F.2d 21 (4th Cir. 1971).

The report of the House of Representatives states:

> "This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings."

H. R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966).

The Senate Report indicates that:

> "These [investigatory files] are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court."

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

The Court below stated "while the Senate's use of the term 'law violators' might be construed to mean transgressions of the criminal law, it can also easily be accommodated to the House statement without doing damage to the statutory language" and thus gave a broad interpretation to the House Report in rendering its opinion.

Black's Law Dictionary defines:

> "Adjudication. The giving or pronouncing a judgment or decree in a cause; also the judgment given.
>
> "Litigation. A judicial controversy. A contest in a court of justice, for the purpose of enforcing a right."

Clearly these words have reference and application to adversary proceedings only. We do not see room to interpret same as to provide the basis for applying the exemption in non-adversary proceedings.

2.

The Court erred in refusing to remand with instructions that an *in camera* inspection be held in order to determine if the requested materials fall within Exemption 7.

Exemption 7 provides for protection of certain records where they are "investigatory files compiled for law enforcement purposes. . . ." 5 U.S.C. §552(b)(7). The decision clearly states that the affidavits are within this exemption and for that reason are not available to the employer. The records alone in no way reflect the nature of these materials and, although the opinion refers to them as affidavits, there is indication in the record and in the pleadings that, in addition to the affidavits, other statements and materials which had been compiled by the Board were sought by Wellman which might well fall outside of even the broadest definition of "investigatory files".

Other circuits, as well as this Court, have been careful to afford the fullest protection to the parties seeking the information by granting *in camera* inspections of documents so as to assure that the government would not be allowed merely to file affidavits or to assert in open court that a file was investigatory and thereby foreclose any other determination of the fact. *Cowles Communication, Inc.* v. *Department of Justice,* 325 F. Supp. 726 (N.D. Cal. 1971). In *Cowles* the court ordered that the files be delivered to

the district court for an *in camera* inspection so that the court could determine whether or not they were investigatory files compiled for law enforcement purposes and enter an appropriate judgment.

The present case contains little more than an assertion by the Board that the materials are investigatory materials so as to afford them protection under Exemption 7.

Even accepting for the purposes of argument the court's decision in the present case, it would appear that it is at odds with this Court's language contained in *Environmental Protection Agency* v. *Mink,* 410 U.S. 93, 93 S. Ct. 839 (1973), which provided that purely factual material not subject to protection by the applicable exemption cannot be withheld from an inquiring party. This court went further to provide that an *in camera* inspection was not automatic, but that the defendant was to be given the opportunity by means of detailed affidavits or oral testimony to demonstrate which portion of the documents contained no factual matter that would be subject to protection. If the defendants fail to meet this burden, then the court provided that the district court might order an *in camera* inspection. It would appear that in this instance the matter should be remanded and the Board given an opportunity to submit whatever affidavits it deems necessary to show that the information was material compiled for law enforcement purposes. Should the Board fail to meet the burden placed upon it by presentation of affidavits or oral testimony then it would be incumbent upon the district court to proceed with an *in camera* inspection.

The thrust of Wellman's presentation to the Court below was that the case was not in a proper posture for appellate decision and should be remanded to the district court for inter alia, *in camera* inspection of the files in question.

Wellman has been afforded no opportunity to contest the assertion made by the Board that the matter falls within Exemption 7 and there has been no factual determination by virtue of an *in camera* inspection nor by other permitted means of investigation on behalf of the court to determine whether the materials fall under the protection afforded by Exemption 7. This would appear to be a necessary procedure to be followed by the District Court in keeping with the decisions of other circuits. *Frankel* v. *Securities and Exchange Commission,* 336 F. Supp. 675 (S.D.N.Y. 1971); *Ackerly* v. *Ley,* 420 F.2d 1336 (D.C. Cir. 1969).

As has been pointed out by writers in this area, the words of the statute seem specifically to put emphasis upon the statutory language and away from all else including implied meanings, reliance upon legislative history and judicial legislation. A Preliminary Analysis, 34 U. Ch. L.B. 761, 783 (1967). This being the case it would appear that the statutory scheme would not permit bare claims asserted by the Board to be used to immunize files from scrutiny.

There has been no true and factual determination of the validity and extent of the Board's claim in this matter that the documents fall within Exemption 7 and it would appear that the best means for providing a true and accurate determination of whether or not the documents in question were truly compiled for investigatory files is to have this matter remanded to the district court with an order that an *in camera* inspection of the documents be carried out so that those documents entitled to protection might be separated from those not entitled to such protection. This would give Wellman an opportunity, even

assuming it is not entitled to investigatory materials, at least to have the court make a determination as to what other materials might be present that would be available to Wellman and to provide that these materials be delivered to them in accordance with the provisions of the *Freedom of Information Act.*

3.

Failure of the Board to give the petitioner access to documents combined with the refusal to hold a hearing was a denial of "due process of law".

The Regional Director of the Eleventh Region of the Board refused to order a hearing on the objections filed at various stages of the representation proceedings. In addition, the Regional Director refused to allow the Petitioner to see the information gathered by the Board upon which the Regional Director based his decisions *in the absence of a hearing.*

The denial of a hearing when substantial rights and material issues of fact have been raised is a denial of due process of law secured by the Fifth Amendment to the United States Constitution. *N.L.R.B.* v. *Bata Shoe Co., Inc.,* 377 F.2d 821 (4th Cir. 1967), cert. denied, 389 U.S. 917 (1967).

The Reg onal Director in his initial decision states that there were material and substantial issues raised. Furthermore the Petitioner has set forth the particulars of the material and substantial issues in its request for review.

This action by the Regional Director when combined with the Respondents' refusal to produce the documents upon

which the Regional Director, in the absence of a hearing, based his decision, is a total denial of due process of law aside from violating the statutory rights granted to the plaintiff under the FOIA. The Petitioner did not get a hearing in the representation proceeding because the Regional Director so decided and, unless the Petitioner is entitled to see the documents upon which the Regional Director based his decision, the Petitioner is helpless to defend itself against the denial of the hearing and the decision which resulted from facts not obtained through a hearing.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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May 22, 1974

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-1581

WELLMAN INDUSTRIES, INC.,

Appellant,

—versus—

THE NATIONAL LABOR RELATIONS BOARD and EDWARD B. MILLER, JOHN H. FANNING, HOWARD JENKINS, JR., RALPH E. KENNEDY, JOHN A. PENELLO, Members of the Board, and REED JOHNSTON, Regional Director for the Eleventh Region,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT FLORENCE. ROBERT F. CHAPMAN, DISTRICT JUDGE.

(Argued November 7, 1973 Decided January 22, 1974)

Before: BOREMAN, *Senior Circuit Judge,* and CRAVEN and FIELD, *Circuit Judges.*

JEFFREY S. DUBIN (Peter D. Hyman, Hyman, Morgan and Brown and Mirkin, Barre, Saltzstein and Gordon, on brief) *for Appellant;* R. Bruce McLean, Attorney (Peter G. Nash, General Counsel, John S. Irving, Deputy General Counsel, Patrick Hardin, Associate General Counsel,

Elliott Moore, Deputy Associate General Counsel, and Abigail Cooley, Assistant General Counsel, National Labor Relations Board, on brief) *for Appellees.*

CRAVEN, *Circuit Judge*:

Wellman Industries, Inc., appeals from an order of the district court denying it access under the Freedom of Information Act, 5 U.S.C. § 552, to affidavits obtained by an NLRB investigator during his inquiry into Union objections to a representation election held at Wellman's Johnsonville, South Carolina, facility. These affidavits, Wellman alleges, were the basis of an order by the Regional Director of the NLRB setting aside that election.

At a second election a majority of Wellman's employees chose the Union as their bargaining representative, and the Union was so certified after objections by Wellman were dismissed and a Request for Review denied by the Regional Director. On September 26, 1972, the Union requested that Wellman bargain; that request was refused on October 4, 1972. The Board then issued a complaint charging the Company with refusal to bargain under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5). The Company raised the defense of improper certification; whereupon General Counsel for the Board moved for summary judgment, and the matter was transferred to the Board in Washington, D. C., by order dated November 15, 1972. Wellman filed a statement in opposition to the motion for summary judgment, together with cross-motions seeking affidavits and memoranda under the FOIA. On May 30, 1973, the motion for summary judgment was denied by the Board and the case remanded to the Regional Director for a hearing on the question of newly-discovered evidence relating to the April 1972 (second) election.

On January 25, 1973, the Company filed the complaint in this case. Without specifically deciding whether exemptions 4 and 7 of the FOIA were applicable,[1] the district court relied upon its equitable power not to issue an injunction where an adequate remedy at law was available and where such action would produce circuity of action, stating: "Foremost in the mind of the Court is the fact that the question of the Plaintiff's rights under the Freedom of Information Act will be before the Circuit Court of Appeals in the very near future, whether this Court does or does not issue an injunction." Wellman appeals, and we affirm, though not for the reasons given by the district judge.

The district court's "balancing of the equities" approach[2] to withholding injunctive relief under the FOIA is not without support, *see General Services Administration* v. *Benson*, 415 F.2d 878 (9th Cir. 1969); *Consumers Union* v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969); Davis, *Administrative Law Treatise* § 3A.6, at 123-24 (1970 Supp.) (hereinafter cited as Davis). However, this court noted in *Wellford* v. *Hardin*, 444 F.2d 21 (4th Cir. 1971), that:

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[1] The district court's order referred to the Board's argument that exceptions 4 and 7 exempted the affidavits from disclosure under the FOIA as "rather weak" and went on to state:

> As to exception 7, it must be remembered that this is not information originally contained in "investigatory files compiled for law enforcement purposes." The statements and affidavits were taken in connection with the certification election, a non-adversary proceeding, and before any complaint was brought by the Board for an unfair labor practice.

[2] The district judge stated in his order:

> In considering whether or not to issue an injunction, this Court must consider all of the facts before it, the purposes and needs of the parties, the burdens involved, the importance of the information and the reasons for non-disclosure.

> After considering voluminous testimony on both sides and balancing the public, private, and administrative interests, Congress decided that the best course was open access to the governmental process with a very few exceptions. It is not the province of the courts to restrict that legislative judgment under the guise of judicially balancing the same interests that Congress has considered.

444 F.2d at 24-25. Again, in *Robles* v. *Environmental Protection Agency,* 484 F.2d 843 (4th Cir. 1973), we said, in another context:

> Equally unpersuasive is the argument that disclosure should be refused because it "would do more harm than good". Such an argument has nothing to do with "personal privacy" but is rather an argument that courts, in disposing of actions under the Act, may exercise discretion to grant or deny equity relief. While such argument has received some limited support, the better reasoned authorities find no basis for this balancing of equities in the application of the Act; indeed, the very language of the Act seems to preclude its exercise.

484 F.2d at 847. We adhere to that viewpoint and hold that 5 U.S.C. § 552(c) means what it says: that the Act "does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated in this section.*" (Emphasis added.)

We must, therefore, look to the specific exemptions provided for in the Act. The Board suggests the affidavits are protected from disclosure as within two exemptions: (1)

"trade secrets and commercial or financial information obtained from a person and privileged or confidential;" and (2) "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; . . . "[3] We think the affidavits are clearly within the second exemption and thus need not decide whether they also fall within the former. *See generally, Consumers Union* v. *Veterans Administration,* 301 F. Supp. 796, 802 (S.D.N.Y. 1969); Davis, *supra* at § 3A.19.

Wellman argues that while the investigatory files exemption applies to information obtained *after* an unfair labor practice complaint has been filed, it does not protect material obtained in Board investigations of representation election irregularities prior to the filing of an unfair labor practice charge since no enforcement proceedings were contemplated and the entire process was non-adversary in nature. *But see Evans* v. *Department of Transportation,* 446 F.2d 821 (5th Cir. 1971). While it is true that the cases cited by the Board uphold non-disclosure under exemption 7 only with regard to files assembled after an unfair labor practice complaint was filed by the Board, *Clement Bros., Inc.* v. *NLRB,* 282 F. Supp. 540 (N.D. Ga. 1968), *Barceloneta Shoe Corp.* v. *Compton,* 271 F. Supp. 591 (D.P.R. 1970),[4] we believe appellant urges too narrow a view of "law enforcement purposes."

Congress has given the Board wide discretion in the enforcement of rights guaranteed by Section 7 of the Na-

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[3] These exemptions are contained in 5 U.S.C. § 552(b)(4) and (7) and are commonly referred to as exemptions 4 and 7.

[4] *See also* Frankel v. Securities and Exchange Comm'n, 460 F.2d 813 (2d Cir.), *cert. denied* 409 U.S. 889 (1972); *cf.* Bristol-Myers Co. v. FTC, 424 F.2d 935, 939-40 (D.C. Cir.), *cert. denied* 400 U.S. 824 (1970).

tional Labor Relations Act, 29 U.S.C. § 157. Under Section 9 of the NLRA, 29 U.S.C. § 159, the Board is responsible for supervising elections, investigating election irregularities and certifying bargaining representatives. When an election investigation is undertaken, as in this case, there is no certainty that an unfair labor practice proceeding under Section 8 will follow. The election irregularities themselves may be sufficient to trigger an unfair labor practice complaint, *see NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), or they may lead only (as here) to avoiding the results of the election and the holding of a second election. In this latter case there is no direct review of such a determination, and in order to challenge the union's certification the employer must refuse to bargain, triggering unfair labor practice proceedings under Section 8(a)(5), as Wellman has done. *A.F.L.* v. *NLRB*, 308 U.S. 401, 407-09 (1940); *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-79 (1964). Whether or not resulting in an unfair labor practice charge, the Board's purpose here was to protect and vindicate rights set out in Section 7. Though procedures vary, if aimed at enforcement of the NLRA we think they are "for law enforcement purposes."

The legislative history of exemption 7 clearly supports such an interpretation.[5] The House Report states:

> This exemption covers investigatory files related to enforcement of *all kinds of laws, labor and securities laws as well as criminal laws.* This would include files prepared in connection with related Government litiga-

[5] The weight which we attribute to the legislative history of exemption 7 is considerably greater than that attributable to the legislative history of exemption 4 for reasons set out by Davis, *supra*, at §3A.19 and §3A.22.

> tion and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings.

H. R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (emphasis added). The Senate Report, in not so broad terms, indicates that:

> These [investigatory files] are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). While the Senate's use of the term "law violators" might be construed to mean transgressions of the criminal law, it can also easily be accommodated to the House statement without doing damage to the statutory language. *See Clement Bros., Inc.* v. *NLRB,* 282 F. Supp. 540 (N.D. Ga. 1968); *Barceloneta Shoe Corp.* v. *Compton,* 271 F. Supp. 591 (D.P.R. 1970).

The practical reasons favoring application of exemption 7 have already been sufficiently exposited by this court and numerous others. We said in *Intertype Co.* v. *NLRB,* 401 F.2d 41 (4th Cir. 1968), *cert. denied* 393 U.S. 1049 (1969), a case almost precisely identical with the case at bar, but decided prior to the effective date of the FOIA, relying on the language of *NLRB* v. *National Survey Service, Inc.,* 361 F.2d 196, 206 (7th Cir. 1966), that:

> If an employee knows that statements made by him will be revealed to an employer, he is less likely, for

> fear of reprisal, to make an uninhibited and non-evasive statement.

401 F.2d at 45. *See also Intertype Co.* v. *Penello,* 269 F. Supp. 573 (W.D. Va. 1967). This same concern has continued to be echoed by courts since the enactment of the FOIA. *See, e.g., Frankel* v. *SEC,* 460 F.2d 813, 817-18 (2d Cir.), *cert. denied* 409 U.S. 889 (1972); *Evans* v. *Department of Transportation,* 445 F.2d 821, 823-23 (5th Cir. 1971); *Clement Bros., Inc.* v. *NLRB,* 282 F. Supp. 540, 542 (N.D. Ga. 1968). We have also stated our agreement with the proposition so clearly set out in the legislative history that exemption of investigatory files is necessary in order to prevent premature disclosure of an investigation so that the Board can present its strongest case in court. *Wellford* v. *Hardin,* 444 F.2d 21 (4th Cir. 1971).

Wellman is not without protection from arbitrary action by the Board. *See NLRB* v. *Poinsett Lumber and Mfg. Co.,* 221 F.2d 121 (4th Cir. 1955); *W. T. Grant Co.* v. *NLRB,* 337 F.2d 447 (7th Cir. 1964); *NLRB* v. *Vapor Blast Mfg. Co.,* 287 F.2d 402 (7th Cir.), *cert. denied* 368 U.S. 823 (1961). But there is no showing of arbitrary action in this case; therefore, the Company must await a final order of the Board and, if aggrieved, pursue its right of review in this court under Section 10(e) or (f) of the NLRA, 29 U.S.C. § 160(e) and (f).

AFFIRMED.

APPENDIX B

Opinion and Order of the District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

Civil Action No. 73-74

WELLMAN INDUSTRIES, INC.,
Johnsonville, South Carolina 29555,

Plaintiff,

—VS.—

THE NATIONAL LABOR RELATIONS BOARD and EDWARD B. MILLER, JOHN H. FANNING, HOWARD JENKINS, JR., RALPH E. KENNEDY, JOHN A. PENELLO, Members of the Board, 1717 Pennsylvania Avenue, N. W., Washington, D. C. 20570, and REED JOHNSTON, Regional Director for the Eleventh Region, 1624 Wachovia Building, 301 North Main Street, Winston Salem, North Carolina 27101,

Defendants.

This matter is before the Court as a result of a temporary restraining order issued by Honorable Robert W. Hemphill enjoining the defendants from taking any action in relation to certain cases presently before the National Labor Relations Board involving plaintiff's Johnsonville,

South Carolina plant. The plaintiff asks this Court to take jurisdiction to review the Board's refusal to hold a post-election hearing on election objections in proceedings conducted pursuant to Section 9 of the National Labor Relations Act (29 U.S.C. 159), and to review the Board's refusal to permit discovery of certain affidavits and statements gathered by the Regional Director of the Eleventh Region during his administrative investigation of those election objections (Board Case No. 11-RC-3365). The plaintiff seeks to enjoin the Board from proceeding with an unfair labor practice complaint issued against the plaintiff by the Board in Case No. 11-CA-5091 until the requested hearing is held and discovery allowed.

The plaintiff contends that it is entitled to disclosure of these documents under the Freedom of Information Act (5 U.S.C. 552).

The defendants have moved to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure and alternatively for summary judgment under Rule 56, upon the ground that the District Court lacks subject matter jurisdiction over this procedure seeking to review NLRB proceedings and asking declaratory and injunctive relief to require the Board to hold agency hearings and to deliver copies of certain statements and affidavits taken during the Regional Director's investigation into a certification election held at the plaintiff's Johnsonville, South Carolina plant on November 17 and 18, 1971.

In August 1971, Textile Workers Union of America, AFL-CIO, filed a Petition for Certification with the Eleventh Region of the Board under Section 9(c) of the National Labor Relations Act, seeking to be certified as the bargaining representative for a group of employees at

the plaintiff's plant. An election was held on November 17 and 18, 1971 in which 488 votes were cast for the Union and 499 votes cast against the Union. Thereafter the Union filed with the Regional Director objections to the conduct of such election and the Regional Director conducted an investigation of said objections and challenged ballots and interviewed witnesses and took affidavits and statements of persons, including plaintiff's employees, and without holding a hearing issued a Supplemental Decision, Order and Direction of Second Election. Shortly after receiving notice of the Supplemental Decision, plaintiff requested from the Regional Director and the NLRB "any statements of any deponents or any individual from whom the Region obtained information in this matter, including particularly those statements upon which the Supplemental Decision, Order and Direction of Second Election was made or upon which the conclusions and/or findings therein were based . . . and all formal documents constituting the record in the case." The Regional Director responded to this request by indicating that "the documents upon which the decision is predicated are attached to the report." No affidavits or statements were attached to the report and the plaintiff again made demand therefor. The Regional Director has refused to make these affidavits available to the plaintiff.

On March 9, 1972, plaintiff filed with the Board a timely Request for Review of the Supplemental Decision, Order and Direction of the Second Election and this was based *inter alia* that it had been denied due process by being denied a hearing and being denied access to employee statements obtained by the Regional Office during its investigation of the Union's objections. Plaintiff's request for review was denied by the Board on the ground that it raised no issues warranting review.

On April 19 and 20, 1972, a second representation election was conducted in which a majority of the voters chose the Union as their bargaining representative. The company filed objections to the election and on June 14, 1972, the Regional Director issued his Second Supplemental Decision and Certification of Representative, wherein he found that, even assuming that the company's factual allegations in its objections to be true, these facts would not amount in law to a justification of setting aside the second election. The Regional Director certified the Union as a collective bargaining representative, and on July 7, 1972 the plaintiff filed with the Board a request for review setting forth its election objections, including the failure to provide a hearing and the failure to furnish it with copies of employees' statements. This request for review was denied and so was plaintiff's motion for reconsideration.

Thereafter the company refused to bargain and on October 5, 1972, the General Counsel of the Board issued a complaint against the plaintiff based upon its refusal to bargain. The plaintiff entered certain affirmative defenses to the action by the general counsel and the general counsel has moved to strike these affirmative defenses and also moved for summary judgment before the Board. The plaintiff thereafter moved before the Board for a hearing and production of documents under the Freedom of Information Act. These matters are presently before the Board and have not been acted upon due to the restraining order of Judge Hemphill dated January 15, 1973.

Except for the Freedom of Information Act, this identical question was presented in the case of *Intertype Co.* v. *Penello,* 269 F. Supp. 573 (W.D. Va. 1967), 401 F.2d 41 (4th Cir. 1968). In a very clear and convincing opinion

Judge Michie held that the Federal District Court does not have jurisdiction to police and review proceedings in progress before NLRB without a showing that established procedure for judicial review is inadequate and that a specific statutory right has been abrogated.

Intertype is based upon the decision of *Myers* v. *Bethlehem Ship Building Corp.*, 303 U.S. 41 (1938) which established that a District Court does not have jurisdiction to enjoin a hearing before, or to review any interlocutory order of, the NLRB because Congress has vested the exclusive power of review in the Circuit Courts of Appeals, and that there must be an exhaustion of administrative remedies.

Myers has been consistently followed, but a few exceptions have developed. These exceptions are rare and involve exceptional circumstances not present in the litigation now before this Court. The first exception is where International implications are present. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

The second exception allows District Court jurisdiction where there has been a substantial showing that Board action has infringed the constitutional rights of the complaining parties. *Fay* v. *Douds*, 172 F.2d 720 (2nd Cir. 1949). This exception has not been followed or allowed by all of the circuits.

In the present case if there has been an infringement of the constitutional right, such infringement will be heard and considered by the Circuit Court of Appeals and remedied in its opinion. The plaintiff alleges that it will be irreparably damaged during the normal administrative process before the National Labor Relations Board and the time necessary for appeal to the Court of Appeals. This claim of irreparable damage by the plaintiff is alleged:

> "That plaintiff will be subject to interference with its business; that there will be numerous plant intrusions by both union officials and other persons normally connected with bargaining sessions . . . agents and servants of plaintiffs will be required to attend bargaining sessions . . . harmonious relations will be destroyed with employees".

Plaintiff also alleges that additional attorneys fees will be incurred and a tremendous amount of time will be necessary in preparation for bargaining.

None of these interferences or alleged damages will occur until after the present litigation before the NLRB has been ended and reviewed by the Fourth Circuit Court of Appeals. If the plaintiff is successful in the proceedings before the NLRB or on appeal to the Fourth Circuit then the above interruptions, intrusions and expenses will never occur. These allegations are now in the realm of speculation. This Court agrees with Judge Michie that *Fay* v. *Douds* should not be followed, at page 578 of *Intertype*:

> "However, more appropriate reliance may be placed upon the reasoning of the Court of Appeals of the Seventh Circuit in *Chicago Automobile Trade Assn.* v. *Madden, supra,* 328 F.2d at page 769, where the Court concluded that an allegation of constitutional harm which might be corrected by later administrative action or upon judicial review with little chance of intervening irreparable injury does not warrant district court jurisdiction."

The third exception allowing district court action is where the Board has acted in excess of its delegated powers and contrary to a specific prohibition of the National Labor

Relations Act. See *Leedom* v. *Kine*, 358 U.S. 184 (1958) which does not apply to the present case.

The fourth exception stated in *Deering-Milliken, Inc.* v. *Johnston*, 295 F.2d 856 (4th Cir. 1961) involved such a delay on the part of the Board as to constitute an exhaustion of administrative remedies, and is not applicable here.

The plaintiff contends that without the affidavits and statements of its employees, it has been denied the constitutional right to effective assistance of counsel protected by the Sixth Amendment. The Court finds that this is an allegation of constitutional harm which can be corrected on judicial review of the matter presently before the NLRB.

The plaintiff also raises the constitutional issue of the Fifth Amendment in that it has not been able to obtain a hearing in the representation proceedings and is thereby denied due process of law. In *NLRB* v. *Bata Shoe Co.*, 377 F.2d 821 (4th Cir. 1967) it was held:

> "Due process of law demands and the present Rules and Regulations of the Labor Board provide that where there is a substantial and material issue of fact relating to the validity of a representation election that a hearing be conducted at some stage of the administrative proceeding before the objecting parties' rights can be affected by an enforcement order."

The Board contends that there is no substantial and material issue of fact relating to the Supplemental Decision, Order and Direction of Second Election, since it was immaterial whether it accepted the plaintiff's date for distribution of a certain handbill or the Union's date of such alleged distribution, since either date did not allow an adequate opportunity to respond to the substantial misrepresentations contained therein.

If a substantial and material issue of fact is created by the conflicting claims of the plaintiff and the Board as to the materiality and truthfulness of the representations in the handbill and of the opportunity or the ability of the Union to adequately respond, these matters may also be reviewed by the Circuit Court of Appeals and do not require this Court to enjoin the administrative proceedings which appear to be on their way to a conclusion and a judicial review by the Circuit Court as provided in the Act.

The Freedom of Information Act creates a very difficult question for this Court. This Act is mentioned in *Intertype*, but at the time it had not become effective and was therefore not considered by Judge Miche. The Board contends that the affidavits, statements and other material sought by the plaintiff are exempted from the Freedom of Information Act under 5 U.S.C. 552(b)(4) and (7). The Court finds this argument rather weak, since exception 4 is for "trade secrets and commercial or financial information obtained from a person and privileged or confidential;" and exception 7 covers "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

Obviously, statements taken in connection with the conduct of the First Election are not trade secrets or commercial or financial information, privileged or confidential, obtained from a person.

As to exception 7, it must be remembered that this is not information originally contained in "investigatory files compiled for law enforcement purposes". The statements and affidavits were taken in connection with the certification election, a non adversary proceeding, and before any complaint was brought by the Board for an unfair labor practice.

The issuance of an injunction is an equitable remedy and the Freedom of Information Act provides:

> "5 U.S.C. 552(a)(3). On complaint, the District Court of the United States in the district in which the complainant resides, or has its principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the Court shall determine the matter de novo and the burden is on the agency to sustain its action."

In considering whether or not to issue an injunction, this Court must consider all of the facts before it, the purposes and needs of the parties, the burdens involved, the importance of the information and the reasons for non-disclosure. Foremost in the mind of the Court is the fact that the question of the plaintiff's rights under the Freedom of Information Act will be before the Circuit Court of Appeals in the very near future, whether this Court does or does not issue an injunction. The proceedings before the NLRB, including the plaintiff's rights under the Freedom of Information Act, will soon be before the Circuit Court for review, under the procedures provided by the National Labor Relations Act, without the interference from this Court. This is the teaching of *Myers* and *Intertype*. If the present action had been brought a year ago, when the Board first refused to deliver the statements and affidavits, this Court would probably have taken jurisdiction. However, the case before the Board has now proceeded to a point where the legal questions can be considered by the

Court of Appeals at an early date. For this Court to take over the litigation now would probably cause unnecessary delay.

For these reasons the Court finds that the temporary injunction issued January 15, 1973 must be dissolved and that the Court will not assume jurisdiction to declare and adjudge the rights of the parties in the present action.

IT IS, THEREFORE, ORDERED that the complaint be and the same is hereby dismissed.

AND IT IS SO ORDERED.

ROBERT F. CHAPMAN
United States District Judge

February 22nd, 1973
Florence, South Carolina

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1785

WELLMAN INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a)[1] is reported at 490 F. 2d 427. The opinion of the district court is not officially reported (Pet. App. 9a-18a).

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1974, and the Company's petition for rehearing *en banc* was denied on February 28, 1974 (Pet. 2). The petition for a writ of certiorari was filed on May 28, 1974. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

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[1]"Pet. App." refers to the appendix to the petition. "B.A." refers to the petitioner's brief and appendix in the court below.

QUESTION PRESENTED

Whether affidavits obtained by the Board's Regional Director during an administrative investigation of objections to an election conducted under Section 9 of the National Labor Relations Act comprise part of "investigatory files compiled for law enforcement purposes" that are protected against disclosure under Exemption 7 of the Freedom of Information Act.

STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, as amended, 5 U.S.C. 552, and the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set out at pp. 3-10 of the petition.

STATEMENT

A. The Board Proceedings

Upon a petition filed under Section 9(c) of the National Labor Relations Act, 29 U.S.C. 159(c), a representation election was conducted among the employees of Wellman Industries, Inc. (herein "the Company") on November 17 and 18, 1971. A majority of the voters rejected the Union[2] as their bargaining representative (B.A. 44). The Union filed objections to the Company's conduct before and during the election. The objections were investigated by the Board's Regional Director, who found that, even resolving the factual issues in the Company's favor, the Company had impermissibly interfered with its employees' free choice in the election.[3] Accordingly, on February 10, 1972, the Director ordered that the first election be set aside, and that a second election be conducted. (B.A. 44-49.)

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[2]The Textile Workers Union of America, AFL-CIO.

[3]The Regional Director found that a handbill circulated by the Company shortly before the polls opened was sufficient, by itself, to warrant setting aside the election because it materially misrepresented the benefits obtained by the Union at another plant which it had organized. The Director thus found it unnecessary to consider the Union's other objections to the election. (B.A. 47-48.)

On February 17, 1972, the Company requested the Regional Director to furnish it with any statements upon which he relied in making his findings. (B.A. 50-52). The Regional Director agreed to provide affidavits of Company officials which the Company had obtained to support its opposition to the Union's objections, if the Company were unable to obtain copies elsewhere (B.A. 52). The Director refused, however, to provide affidavits from the Union's witnesses, which a Board investigator had obtained (B.A. 53).

The Company requested the Board to review the Regional Director's decisions. The Company alleged, *inter alia*, that it had been improperly denied a hearing on the election objections, and denied access to statements obtained by the Regional Office during its investigation of these objections. The Board denied the Company's request for review on the ground that it raised no issues warranting review. (See Exhibits "F" and "G" to the complaint filed by the Company in the district court.)

On April 19 and 20, 1972, a second representation election was conducted among the Company's employees, in which a majority of the voters chose the Union as their bargaining representative.[4] The Company filed objections to the election. The Regional Director, after an administrative investigation, concluded that, even assuming the Company's factual allegations to be true, they did not warrant setting aside the election. Accordingly, the Regional Director certified the Union as the bargaining representative of the Company's employees in the appropriate unit. (B.A. 53-62.)

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[4]577 employees voted for the Union, 466 against (B.A. 53).

The Company requested the Board to review the Regional Director's second decision. The Company again alleged, *inter alia*, that, in the first election, it had been improperly denied a hearing on the objections and denied access to statements relating to those objections. The Board denied the Company's request for review on the ground that it raised no issues warranting review. (See Exhibits "J" and "K" to the complaint filed by the Company in the district court.)

The Union requested the Company to bargain, but the Company refused. The Union thereupon filed charges with the Board and a complaint was issued against the Company alleging that it had refused to bargain in violation of Section 8(a)(5) and (1) of the Act (B.A. 62). When the Company's answer merely challenged the Union's certification (B.A. 67), the Board's General Counsel filed a motion with the Board for summary judgment (B.A. 68). On November 15, 1972, the Board issued an order to show cause why the General Counsel's motion for summary judgment should not be granted (B.A. 69). The Company filed a statement in opposition to the General Counsel's motion for summary judgment, and cross-motions for hearing and production of documents (B.A. 70, 74).

B. The Court Proceedings

On January 25, 1973, before the Board ruled on the General Counsel's motion for summary judgment and the Company's opposition and cross-motions,[5] the Company filed the present suit in the District Court for the District

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[5]On May 30, 1973, the Board denied the General Counsel's motion for summary judgment and ordered a hearing before an Administrative Law Judge on the newly discovered evidence, relating to the second election, presented by the Company. The Law Judge, after a hearing, recommended that the Company's objections to the election be overruled and that the Company be ordered to bargain with the Union. On June 17, 1974, the Board adopted the Law Judge's recommendation. *Wellman Industries, Inc.*, 211 NLRB No. 96. The Company has petitioned the court of appeals for the Fourth Circuit to review the Board's decision and order, No. 74-1732, filed June 26, 1974.

of South Carolina. The Company claimed that it was entitled, under the Freedom of Information Act, to all the affidavits obtained by the Regional Director. The Company also sought to enjoin the unfair labor practice proceeding until the Board held a hearing on the objections to the first election and furnished the affidavits (Pet. App. 10a).

The district court dismissed the Company's complaint in its entirety (Pet. App. 9a-18a). The Company appealed only that portion of the district court's order which refused to grant the relief sought under the Freedom of Information Act. (B.A. (i), 1-3, 20). The court of appeals affirmed the order of the district court, holding that Exemption 7 of the Freedom of Information Act protected the affidavits in question against disclosure (Pet. App. 1a-8a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of other courts of appeals. No issue warranting review is presented.

1. Exemption 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(7), protects against disclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." The basic question presented by the petition is whether the court of appeals properly concluded that affadavits obtained by the Board's Regional Director, during an administrative investigation of objections to an election conducted under Section 9 of the National Labor Relations Act, are covered by Exemption 7.[6]

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[6]There is no substance to petitioner's contention (Pet. 19-22) that the court of appeals erred in refusing to remand to the district court for an *in camera* inspection of Board files. The record shows that throughout this litigation petitioner has specifically sought only affi-

The courts have held, and petitioner does not question (Pet. 16-17), that Exemption 7 covers files compiled during an investigation of unfair labor practices.[7] Petitioner contends, however, that a different conclusion is required here because the affidavits were obtained in connection with a representation proceeding. The court of appeals properly rejected this contention.

As the court of appeals noted (Pet. App. 6a), "[w]hether or not resulting in an unfair labor practice charge, the Board's purpose" in conducting an election investigation is "to protect and vindicate" the employees' right, guaranteed by Section 7 of the National Labor Relations Act, freely to select or reject a bargaining representative—no less than if the Board were investigating an unfair labor practice charge alleging an abridgement of that right.[8] Ac-

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davits and similar statements obtained by the Regional Director in his investigation of objections to the election of November 17-18, 1971, and the formal record in that proceeding (B.A. 43, 50; Pet. App. 11a). The Board has furnished petitioner with the formal documents requested (B.A. 52, 33-43), and accordingly the only issue involves the producibility of the requested affidavits and statements. That issue can be determined without *in camera* inspection of the affidavits or statements, or the remainder of the Board's investigative files. See *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 93.

[7] *Clement Bros., Inc.* v. *National Labor Relations Board*, 282 F. Supp. 540, 542 (N.D. Ga.), approved in a collateral proceeding, *National Labor Relations Board* v. *Clement Bros., Inc.*, 407 F. 2d 1027, 1031 (C.A. 5); *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591, 594 (D.P.R.). See also H. Rep. No. 1497, 89th Cong., 2d Sess. 11 (Pet. App. 6a-7a); *Frankel* v. *Securities and Exchange Commission*, 460 F. 2d 813, 817 (C.A. 2), certiorari denied, 409 U.S. 889; *Evans* v. *Department of Transportation*, 446 F. 2d 821, 824 (C.A. 5), certiorari denied, 405 U.S. 918.

[8] The Company's subsequent refusal to bargain did in fact trigger such a proceeding here *(supra,* p. 4).

cordingly, since both a representation election investigation and an unfair labor practice investigation are "aimed at enforcement of the National Labor Relations Act," they both are undertaken "for law enforcement purposes."[9]

Moreover, the purposes of Exemption 7 are, *inter alia*, "to prevent the premature disclosure of the results of an investigation * * * and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information." *Frankel* v. *Securities and Exchange Commission, supra*. Thus, in an investigation into alleged irregularities in a representation election, no less than in an unfair labor practice investigation:

> If an employee knows that statements made by him will be revealed to an employer, he is less likely, for fear of reprisal to make an uninhibited and non-evasive statement. [*Intertype Co.* v. *National Labor Relations Board*, 401 F. 2d 41, 45 (C.A. 4), certiorari denied, 393 U.S. 1049, quoting from *National Labor Relations Board* v. *National Survey Service, Inc.*, 361 F. 2d 199, 206 (C.A. 7).]

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[9]Contrary to petitioner's contention (Pet. 16-19), the fact that a representation proceeding is nonadversary in nature and may not culminate in a final order which is reviewable under Section 10(e) or (f) of the Act, 29 U.S.C. 160(e) or (f), does not establish that an investigation in a representation proceeding is not "for law enforcement purposes" within the meaning of Exemption 7. See *Frankel* v. *Securities and Exchange Commission, supra*; *Evans* v. *Department of Transportation, supra*; *Weisberg* v. *U.S. Department of Justice*, 489 F. 2d 1195 (C.A.D.C.) *en banc*), certiorari denied, May 13, 1974, No. 73-1138; *Center for National Policy Review* v. *Weinberger*, C.A. D.C., No. 73-1090, decided May 21, 1974.

Accord: *National Labor Relations Board* v. *Golden Age Beverage Co.*, 415 F. 2d 26, 34 (C.A. 5). Similarly, other persons would tend to be inhibited in reporting information to the Board if they knew that their statements would be readily producible. See *National Labor Relations Board* v. *Scrivener*, 405 U.S. 117, 121.[10]

2. No independent ground for review is presented by petitioner's contention (Pet. 22-23) that the Board's combined refusal to grant its discovery requests and to hold a hearing on the objections filed to the first election violated "due process of law." The district court correctly concluded that it lacked jurisdiction to review that question since it could be fully "review[ed] by the Circuit Court as provided in the [NLRA]" (Pet. App. 17a).[11] Since petitioner took no appeal from this portion of the district court's decision, that question is not now properly before this Court. In any event, the district court's decision is supported by settled authority. See *Intertype* v. *National Labor Relations Board, supra*, 401 F. 2d at 44; *Vapor Blast Mfg. Co.* v. *Madden*, 280 F. 2d 205, 209 (C.A. 7), certiorari *denied, 364 U.S. 910. See also Meyers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Aircraft and Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752.

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[10]Under the Board's rules (29 C.F.R. 102.118(b)(1)), which have been sustained by the courts (see *Raser Tanning Corp.* v. *National Labor Relations Board*, 276 F. 2d 80, 83 (C.A. 6), certiorari denied, 303 U.S. 830), affidavits taken by Board agents during the course of an investigation are not producible unless and until the person giving the affidavit is called to testify as a witness at a Board hearing. Congress did not intend to alter this rule by passage of the Freedom of Information Act: "Discovery for litigation purposes is not an expressly indicated purpose of the Act." *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24.

[11]Indeed, the Company has recently sought such review (n.5, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.[12]

Respectfully submitted.

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SEPTEMBER 1974.

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[12]The Board's petition for certiorari in *National Labor Relations Board* v. *Sears, Roebuck and Company*, No. 73-1233, certiorari granted May 28, 1974, involves a claim that entirely different kinds of Board documents are exempt from disclosure under the Freedom of Information Act, because, *inter alia*, they are investigatory files as defined in Exemption 7. The *Sears* memoranda, in addition, are developed in the course of unfair labor practice proceedings; here, petitioner contends only that the documents are not protected because they relate to a representation proceeding. It would not be appropriate to defer decision on this petition until *Sears* has been decided, because, regardless of whether the Court agrees with our contentions concerning the staff memoranda in *Sears*, the documents here, statements of witnesses obtained in the course of an administrative investigation, clearly are part of investigatory files.